RE PRASERT WONGPHATTARAKUL & ANOR.

HIGH COURT MALAYA, PULAU PINANG
[DIVORCE PETITION NO: 33–67–95]
T SELVENTHIRANATHAN J
24 FEBRUARY 1996

FAMILY LAW: *Divorce - Domicile - Whether petitioners must be domiciled in Malaysia - Joint petition - Petitioner husband a foreigner - Proof of Malaysian domicile - Whether wife acquires husband's domicile under common law - Law Reform (Marriage and Divorce) Act 1976, s. 48*

FAMILY LAW: *Divorce - Marriage celebrated outside Malaysia - Proof of - Requirements - Divorce and Matrimonial Proceedings Rules 1980, r. 34*

This was a joint petition presented by the petitioners for the dissolution of their marriage which had taken place in Perth, Western Australia on 3 February 1988. The petitioners exhibited a photocopy of their marriage certificate as proof of their marriage. The first petitioner ('the husband') held a Thai passport while the second petitioner ('the wife') held a Malaysian identity card. When the petition first came up for hearing, the Court drew Counsel's attention to the lack of any statement in the petition that the petitioners were domiciled in Malaysia at the time the petition was presented, a requirement under s. 48 of the Law Reform (Marriage and Divorce) Act 1976. The Court granted an adjournment to allow Counsel to obtain the same but no such statement was in fact obtained after a second adjournment.

Held:

[1] Under s. 48 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), a Court can only make a decree of divorce where the domicile of the parties to the marriage at the time the petition is presented is Malaysia. As the husband held a Thai passport, it could be inferred that he was a citizen of Thailand and was presumably domiciled there still. There was not an iota of evidence to show that he had abandoned his Thai or other domicile of origin and acquired a domicile of choice in Malaysia.

[2] At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. This is given statutory recognition in s. 48(1)(c) of the Act which requires the domicile of both parties to be in Malaysia before the Court can entertain proceedings for a decree of divorce. In this case, there was no evidence to show that the wife was a Malaysian citizen although she held a Malaysian identity card, as only the number was disclosed in the preamble of the petition and her citizenship or other status was not disclosed.

[3] The parties had also failed to satisfy the requirements of r. 34 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') which requires proof of a marriage celebrated outside Malaysia to be provided either by the original marriage certificate or a certified copy of the entry in the register of marriages of that country. Hence, there was no acceptable proof of the marriage as required under s. 48(1)(b) of the Act.

Obiter dictum:

[1] Section 49(1) of the Act was specifically enacted to give relief to a deserted or abandoned wife who by virtue of her marriage had acquired a domicile of dependence in Malaysia or had had her domicile of origin in Malaysia transformed into a domicile of dependence because of her marriage. The section applies equally to a wife who has not undergone any change in her domicile in Malaysia because the parties to the marriage were domiciled in Malaysia at the time the marriage was contracted but who may be faced with a possible change in her domicile of dependence at the time of presentation of the petition owing to her husband having acquired a domicile of choice elsewhere.

[Petition dismissed.]

Cases referred to:
Winans & Another v. Attorney-General [1904] AC 287 ***(refd)***
Melvin Lee Campbell v. Amy Anak Edward Sumek [1988] 2 MLJ 338 ***(refd)***
Tan Guan Hock v. Khor Chai Heah [1990] 1 MLJ 422 ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, rr. 2(3), 8, 15(2), 34
Interpretation Acts 1948 & 1967, s. 62
Law Reform (Marriage and Divorce) Act 1976, ss. 3(2), 26, 27, 31, 48(1)(c), (2)(c), 49(1)(a), (1)(b), 52
Law Reform (Marriage and Divorce) Rules 1982, r. 12
National Registration Regulations 1990, regs. 3(i), 4(c)(viii), 5(2), (3)
Rules of the High Court 1980, O. 18 r. 19, O. 92 r. 4

Other source referred to:
Halsbury's Law of England, 4th Edn.

For the petitioners - Cynthia Lee Bee Gaik (Subsequently Abdul Rahim bin Mohamed); M/s. Gan Teik Chee & Ho

JUDGMENT

T Selventhiranathan J:

The petitioners, Prasert Wongphattarakul (Thailand passport number N243453) and Poh Bee Bee (NRIC number 540713-07-5000), jointly petitioned for the dissolution of their marriage.

In their joint petition (Encl. (1)) presented on 18 March 1995, the petitioners stated that they were married at the district registrar's office in Perth, Western Australia, on 3 February 1988, that they had cohabited at Block 54-11-12 Jalan Low Yat, Batu Ferringhi, 11100 Penang, that they had mutually agreed and freely consented to have their marriage dissolved, that there was no child of the family now living, and that there had been no previous proceedings in Malaysia or elsewhere with respect to the marriage or which proceedings were capable of affecting its validity or subsistence. They affirmed a joint affidavit (Encl. (2)) as to the truth of the contents of the petition.

When the petition first came up for hearing before me on 8 May 1995, I drew the attention of Cik Cynthia Lee Bee Gaik for the petitioners to there being no statement in the **joint petition** (emphasis added) to show that the requirement of s. 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') for the parties to the marriage to be domiciled in Malaysia when the petition was presented had been satisfied, as this petition was clearly not one to which s. 49 of the Act applied instead to confer jurisdiction on the Court to entertain proceedings by a petitioner wife alone for a decree of divorce under Part VI of the Act. It is convenient to set out here the provisions of those two sections **in extenso** to appreciate their full force and effect:

> 48(1) Nothing in this Act shall authorise the court to make any decree of divorce except -
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> (a) where the marriage has been registered or deemed to be registered under this Act; or
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> (b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and
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> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.
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> (2) Nothing in this Act shall authorise the court to make any decree of judicial separation except -
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> (a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(c) where both the parties to the marriage reside in Malaysia at the time of the commencement of proceedings.

49(1) Notwithstanding anything to the contrary in s. 48(1)(c), the Court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if -

(a) the wife has been deserted by the husband, or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or

(b) the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.

(2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.

(3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law.

Learned counsel's attention was drawn to the fact that the preamble in the petition clearly stated that the petitioner husband is the holder of a Thai passport from which it could be inferred that he is a citizen of Thailand and presumably is domiciled there still. There was not an iota of evidence to indicate that he was originally possessed of a Malaysian domicile of origin which had been abandoned and that the same had reverted to him or had been resumed or reactivated upon his abandoning a domicile of choice that he had acquired, or that he had abandoned his Thai or other domicile of origin or of choice, as the case may be, and acquired a domicile of choice instead in Malaysia by intending to make, and making, Malaysia his permanent home. Please see *Winans and Another v. Attorney-Genera*l [1904] AC 287 for a comprehensive treatment of the subject-matter of the domicile of origin, its abandonment, the acquisition of a domicile of choice and the resumption, reversion or reactivation of the domicile of origin upon the abandonment of the domicile of choice.

Section 3(2) of the Act no doubt raises a presumption that a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia. However, this presumption could certainly not be applied in favour of the petitioner husband who most likely is a citizen of Thailand by

virtue of his holding a passport of that country. Neither could it be applied, without the adducing of further evidence, in favour of the petitioner wife for the reasons which appear later in this judgment.

Learned Counsel then applied for an adjournment of the hearing of the petition to file a supplementary affidavit in relation to the domicile of the parties and the case was therefore adjourned to 12 June 1995 when it was adjourned yet again to 26 June 1995 for the same reason.

On 26 June 1995 Encik Abdul Rahim bin Mohamed then appeared for the petitioners. He informed the Court that he had not been able to file the required supplementary affidavit whereupon the Court was constrained to dismiss the petition as it stood on the ground that the Court had no jurisdiction to entertain the petition as the mandatory requirement of s. 48(1)(c) of the Act had not been satisfied. Section 48(2)(c) of the Act was not applicable in the present case as the parties were not seeking a decree of judicial separation under that section. Even if such a decree were sought, it is doubtful whether the Court could entertain the proceedings on the pleadings as they stood because of the total paucity of any averment in the petition that the parties to the marriage were resident in Malaysia at the time of the commencement of the proceedings. Nor could s. 49(1)(a) or (b) of the Act be invoked as this was not a case where the petition was presented solely by a petitioner wife who had been deserted by the husband, or where the husband had been deported from Malaysia under any law for the time being in force relating to the deportation of persons and the husband was before the desertion or deportation domiciled in Malaysia, or where the petitioner wife is resident in Malaysia and has been ordinarily so resident for a period of two years immediately preceding the commencement of these proceedings. Section 49(1) of the Act is therefore clearly confined to proceedings commenced by a petitioner wife in the circumstances spelt out in that section.

Before a Court can exercise its jurisdiction to make a decree of divorce under the Act, the parties have to show that they as well as the marriage sought to be dissolved satisfy the mandatory requirements of s. 48(1) of the Act. They have to show either:

(1) that the marriage has been registered or is deemed to be registered under the Act **and** that their domicile at the time of the presentation of the petition is in Malaysia; or

(2) that their marriage was contracted under a law providing that, or in contemplation of which, marriage is monogamous **and** that their domicile at the time of the presentation of the petition is in Malaysia (emphasis added).

In the present case it may conceivably be argued that the Court should take judicial notice of the fact that the marriage was contracted and solemnised in Western Australia under a law which presumably provided that the marriage was monogamous (although there is nothing in the petition to that effect). However, only a photostated copy of the marriage certificate was exhibited to the petition and this clearly does not satisfy the requirements of r. 34 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'). That rule provides as follows:

> 34(1) The celebration of a marriage outside Malaysia and its validity under the law of the country where it was celebrated may, in any matrimonial proceedings in which the existence and validity of the marriage is not disputed, be proved by the evidence of one of the parties to the marriage and the production of a document purporting to be –
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> (a) a marriage certificate or similar document issued under the law in force in that country; or
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> (b) a certified copy of an entry in a register of marriages kept under the law in force in that country.
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> (2) Where a document produced by virtue of para. (1) is not in English it shall, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit.
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> (3) This rule shall not be construed as precluding the proof of a marriage in accordance with the Evidence Act 1950 or in any other manner authorised apart from this rule.

Its clear from paras. (1) and (3) of r. 34 that either the original or a certified copy of the marriage certificate has to be produced in the circumstances. An uncertified photostated copy of a purported marriage certificate bearing **only the names** of the parties (without any further particulars of identification) cannot satisfy the requirements of those paragraphs for the celebration of a marriage outside Malaysia and its validity under the law of the country where it was celebrated (where the existence and validity of the marriage is not disputed as in the present case) to be proved by the evidence of one of the parties to the marriage and the production of either the marriage certificate itself or a certified copy of an entry in a register of marriages kept under the law in force in that country. Hence, there is no acceptable proof in the present case to satisfy the requirement of s. 48(1)(b) of the Act.

The form of the petition also needs to be commented upon. Rule 8(1) of the Rules provides as follows:

> 8(1) Unless otherwise directed, every petition, other than a petition under r. 80 or 81, shall contain the information required by Form 2 as near as may be in the order there set out and any further or other information required by such of the following paragraphs of this rule as may be applicable.

The petition in the present case appears to be based upon Form 3 in the Schedule to the Rules and not Form 2. However, Form 3, unlike Form 2 which derives its authority from r. 8(1), does not seem to similarly derive its authority from any particular rule and is to that extent not a form with which compliance is required pursuant thereto. In the circumstances, it would be in order for joint petitioners to utilise a combination of Forms 2 and 3 with such variations as the circumstances of the particular case may require as provided by r. 2(3) which reads as follows:

> (3) In these Rules a form referred to by number means a form so numbered in the Schedule, or a form substantially to the like effect, with such variations as the circumstances of the particular case may require.

In so doing, s. 62 of the Interpretation Acts 1948 and 1967 (which section is generally applicable in the interpretation of written laws enacted or made after the 18 May 1967) which stipulates that:

> 62. Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation of the form if the deviation has no substantial effect and is not calculated to mislead.

should be borne in mind.

Apart from the foregoing, there is no averment in the petition that the marriage was registered or is deemed to have been registered under the Act pursuant to ss. 26, 27 or 31 of the Act and r. 12 of the Law Reform (Marriage and Divorce) Rules 1982 in order to invoke s. 48(1)(a) of the Act, if at all it is sought to make that provision applicable in the present case.

I find further support for the interpretation I place on the provisions of s. 48(1) of the Act in the decisions of the Kuching High Court in *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 2 MLJ 338 and of the then Supreme Court in *Tan Guan Hock v. Khor Chai Heah* [1990] 1 MLJ 422 and the cases cited therein.

Melvin Lee Campbell also involved a joint petition for divorce by mutual consent presented under s. 52 of the Act and, in my view, the judgment in that case will bear repetition to show the obvious difference between the detailed facts adduced in that case in stark contrast to the glaring paucity of

facts to raise even remotely the possibility of the petitioner husband being domiciled in Malaysia in the present case. In that case, Tan Chiaw Thong J delivered his judgment in the following terms:

> The matter which calls for determination by this Court at this hearing relates to the domicile of the husband petitioner at the time when the joint petition for divorce by mutual consent was presented under s. 52 of the Law Reform (Marriage and Divorce) Act 1976.
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> Section 48(1) of the 1976 Act provides, *inter alia*, that nothing in that Act shall authorize the Court to make any decree of divorce except '(c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. There is no question about the wife petitioner at the material time being domiciled in Malaysia. The provision of s. 48(1)(c) in my view requires that the Court must be satisfied that at the time when the petition in the instant case was presented the domicile of both the petitioners was in Malaysia. It is true that in the instant petition itself, the husband petitioner asserts that at the time of the presentation of the petition he was domiciled in Malaysia, and this is supported and reiterated in his affidavit sworn on 13 July 1987. In this instance, I would observe that the evidence of the husband petitioner states that he was, and is, an agnostic, but his affidavit was sworn and not affirmed. However that may be, this is of no consequence, in my view, as regards the domicile of the husband petitioner. I do not take this factor in any way as operating against the husband petitioner.
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> As rightly pointed out by learned Counsel who appeared for the State Attorney-General as *amicus curiae* – and this is not a matter at issue – the onus of proving that the husband petitioner at the material time had abandoned his domicile of origin in favour of a domicile of choice in Malaysia rests squarely on the husband petitioner.
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> There are two essential elements involved in determining the domicile of choice, and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice. In this instance, it is to be noted that para. 434 of *Halsbury's Law of England* (4th Edn.) states as follows:
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> > 434. **Direct and secondary evidence of intention.**
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> > Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even though no suspicion may be entertained of the truthfulness of the witness.
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> > Expressions of intention, written or oral, may be given in evidence, but such evidence must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear

and consistent they cannot prevail against a course of conduct leading to an opposite inference.

And in the next paragraph, under the heading 'Residence as Evidence', the following passage occurs:

Residence in a country, especially if it is continued for a long period, is evidence of an intention to remain there; in the absence of other evidence, residence alone may support the inference that a domicile has been acquired. Such cases will be rare, and, while residence is always material evidence, it is seldom decisive, for slight circumstances may serve to show the absence of a settled intention.

The next paragraph in my view is also relevant, and it states:

436. **Residence as a matter of duty.**

A person may reside in a country as a result of his being under some duty, public or private. Examples include diplomats and other overseas servants of the Crown, members of the armed forces, employees of international organizations or of commercial undertakings with interests in several countries, and domestic servants attached to such persons. Such residence is likely to be temporary and may be in some measure involuntary. if it is not accompanied by any intention to make a permanent home in the country of residence, the propositus will retain his former domicile.

Such a person may be held to have acquired a domicile of choice in the country of residence if the appropriate intention can be derived from all the circumstances. Cogent evidence of such intention is required. The fact that the public office is in the service of the country of residence, an alien country, is material.

In this connection, the husband petitioner has stated in effect that his stay in Indonesia was necessitated by the nature of his employment there and is no indication that he has decided to reside in that country.

As stated, it is not in issue that the onus of proving that the husband petitioner has abandoned his domicile of origin in favour of a domicile of choice in Malaysia rests on him. In this connection, the onus is a heavy one, as indicated in the case of *Winans and Another v. Attorney-General* [1904] AC 287 in the judgment of Lord Macnaghten in that case. The following passage appears at p. 291 of the judgment:

So heavy is the burden cast upon those who seek to shew that the domicile of origin has been supersed by a domicile of choice! And rightly, I think. A change of domicile is a serious matter – serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country – more serious still when one of the two is altogether foreign. The change may involve far-reaching

consequences in regard to succession and distribution and other things which depend on domicile.

Further, proof of change of domicile having the effect of abandoning a domicile of origin in favour of a domicile of choice must be proved with perfect clearness and satisfaction (see the same judgment at p. 292).

The question I have to decide, therefore, is whether, on the evidence given by the husband petitioner, taken in the light of his assertions in the joint petition and his supporting affidavit, the Court is satisfied that the evidence has shown with perfect clearness and satisfaction in this Court that the husband petitioner had abandoned his domicile of origin and acquired a domicile of choice at the time of the presentation of the petition.

Learned Counsel for the husband petitioner emphasized and elaborated on the factors indicating that the husband petitioner had abandoned his domicile of origin and acquired a domicile of choice in Malaysia at the relevant time. He has stressed that the husband petitioner had married a native of this state; that he had set up the matrimonial home of his family here; that he had resided here for a long period; that he had arranged for the issue of the marriage to reside and be educated here; that he had expressed his intention to be converted to the religion of Islam and had taken steps to have that intention materialized; and also that he had taken steps to explore the possibility of investing in Malaysia. On this last factor, I would observe that on his own evidence, whatever steps the husband, petitioner has taken in relation to setting up business on joint venture or otherwise in Malaysia so far are only exploratory. Except for two periods which he mentioned – from March to December 1979 when he went back to the USA with his wife, and from January 1981 when they stayed for two years in Singapore – he has resided in this state since June 1977 when he arrived in Malaysia. He is now employed as a line pilot with PT Airfast, a helicopter firm in Indonesia, and before that, he was managing pilot of that firm. The husband petitioner at the time of his stay in Sarawak was employed as a helicopter pilot for Wira Kris Schriner in Kuching until his employment subsequently in PT Airfast, Indonesia. Other factors urged in his favour are that, during his stay in Sarawak, he has contributed quite a large sum of money to the extent of around $20,000 towards the purchase of a house for his parents-in-law at Kampung Kakai in Serian, and the wife petitioner is still residing there with the child of the marriage. However, on the other hand, the husband petitioner has stated that for himself, he has not bought any property nor made any actual investment in Malaysia even up to today, and as indicated earlier, the last thing he has done was to take steps of an exploratory nature towards the possibility of setting up business on joint venture or otherwise in Malaysia. He has stated in evidence that when he first arrived here, he had the feeling that this was the place where he would make his home, but as indicated above, any pronouncement as to the intention of the husband petitioner should be considered with care and caution having regard to the fact that this pronouncement was made in the light of the presentation of the instant petition; it must be weighed with other relevant factors.

> The relevant time to decide whether the husband petitioner has acquired a domicile of choice and abandoned his domicile of origin is at the time of the presentation of the petition. At that time, the matrimonial relationship between both petitioners had broken down. The husband petitioner has stated that there had been a lack of communication between him and the wife petitioner. At that time, apart from his own pronouncement that he intended to make Malaysia his home permanently, the only other indication of this is his contribution, as stated, towards the purchase of the house of his parents-in-law and his contribution towards a small business of a foodstall run by his wife. At that time, he had no permanent residence in Malaysia.
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> Taking into consideration all factors both in favour and against the husband petitioner in the light of all the relevant circumstances, and giving due consideration to his assertion that he intended to make Malaysia his permanent home, and also bearing in mind that the burden of proving the abandonment of his domicile of origin and the acquisition of a domicile of choice in Malaysia falls squarely on the husband, petitioner, I have, with regret, come to the conclusion that the husband petitioner has not succeeded in showing to my satisfaction that at the time of the presentation of the joint petition his domicile was in Malaysia. Accordingly, I rule that in relation to the instant joint petition, the Court has no jurisdiction to entertain it.

Despite the enumeration of the various indicia pointing to the acquisition of a domicile of choice in Malaysia in that case, the Court there found that the petitioner husband's domicile of origin had not been effectively abandoned and a domicile of choice acquired in Malaysia for the Court to have jurisdiction to hear the petition. In the present case, the absence of any indicia pointing to the existence of a domicile of origin or the acquisition of a domicile of choice in Malaysia by the petitioner husband is even more glaring and this Court therefore clearly lacks the necessary jurisdiction to entertain the petition. I accordingly adopt the reasoning in the judgment in *Melvin Lee Campbell* for the purposes of the present case with one qualification as to the following statement appearing in the second paragraph of that judgment:

> There is no question about the wife petitioner at the material time being domiciled in Malaysia.

With respect, it is doubtful whether this finding can be correct in the light of the law applicable under the Act. This is because although s. 3(2) of the Act provides that for the purposes of the Act a person who is a citizen of Malaysia shall be deemed to be domiciled in Malaysia, this presumption is capable of being rebutted upon proof to the contrary. At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. This common-law position is given statutory recognition in s. 48(1)(c) of the Act by the requirement for the domicile of the **parties** to be in Malaysia (emphasis added) before the Court can entertain proceedings for a decree of divorce. It

is because of this reference to the single or common Malaysian domicile of the parties, which is predicated upon the wife having or acquiring the Malaysian domicile of the husband, that the parliament had found it necessary to enact s. 49(1) of the Act to grant relief to a wife who has been deserted by her husband or whose husband has been deported from Malaysia, and whose husband was **before** the desertion or deportation domiciled in Malaysia (emphasis added), by enabling the wife to bring proceedings although the husband is not domiciled or resident in Malaysia at the time the petition is presented. That provision also enables a wife, whose husband is not domiciled or resident in Malaysia at the time the petition is presented, to bring proceedings based upon her being resident in Malaysia and having been so ordinarily resident for a period of two years immediately preceding the commencement of the proceedings. Therefore in my view, with respect, it is doubtful whether the Court in *Melvin Lee Campbell* could inescapably conclude that the petitioner wife there was domiciled in Malaysia at the material time when it found that the petitioner husband had not abandoned his domicile of origin and consequentially acquired a domicile of choice in Malaysia. In my view, s. 49(1) of the Act was specifically enacted to give relief to the deserted or abandoned wife who by virtue of her marriage had acquired a domicile of dependence in Malaysia or had her domicile of origin in Malaysia transformed into a domicile of dependence because of her marriage. This section therefore applies equally to such a wife who has not undergone any change in her domicile in Malaysia because the parties to the marriage were domiciled in Malaysia at the time the marriage was contracted but who may be faced with a possible change in her domicile of dependence at the time of the presentation of the petition owing to her husband having acquired a domicile of choice elsewhere.

Having said that, I find that there is no shred of evidence in the present case to show that the petitioners were domiciled in Malaysia at the time of the presentation of the petition. Repeated adjournments of the hearing of the petition to allow such evidence to be furnished proved futile as the solicitors representing the petitioners were unable to have any supplementary affidavit affirmed and filed to remedy the shortcoming.

In *Tan Guan Hock v. Khor Chai Heah* [1990] 1 MLJ 422, the then Supreme Court, in allowing an appeal against the decision of a High Court refusing an application to amend a petition pertaining to the domicile of one of the parties, dealt with the arguments raised as follows at p. 423 of the report:

> ... His Lordship however thought that the respondent in this case would be prejudiced by the amendment in view of her application to strike out the petition since the fact of domicile was a crucial issue and it had been averred that the petitioner was domiciled in Singapore. On that ground alone he was of the view

that the senior assistant registrar was wrong in allowing the application, to amend the petition and accordingly allowed the respondents appeal to him with costs, so that the petition should stand in its original form.

Before us, Mr. Cyrus Das, who appeared for the petitioner, after referring to the petition and r. 15(2) of the Divorce And Matrimonial Proceedings Rules 1980, contended that the amendment did not prejudice the respondent. He referred to *Wilson v. Wilson* [1972] LR 2 P&D 435 and pointed out that it was held in that case that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive, but the question for the Court was whether, upon a review of all the circumstances, it gave credit to his evidence.

Counsel also referred to *Joseph Wong Lun v. Yeoh Loon Goit* [1978] 1 MLJ 236 in which case the Singapore High Court held that clear evidence was required to establish a change of domicile. In particular, to displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. Chua J, following *Wilson v. Wilson*, also held that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive. The question for the Court was whether, upon a review of all the circumstances, it gave credit to his evidence.

On the intention to change one's domicile of origin Counsel referred to the following s. 3(2) of the Act:

> For the purpose of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

Reference was also made to the following passage in *Rayden on Divorce* (14th Edn.) at p. 56:

> The burden of proving that a domicil has been chosen in substitution for the domicil of origin is on the person who asserts that a domicil of choice has been acquired in place of the domicil of origin: the intention must be proved with perfect clearness.

Counsel submitted that the question of the domicile of the parties would still have to be proved when the petition is heard by the Court.

Mr. Yap Siong Cheng, Counsel for the respondent referred to *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 2 MLJ 338 in which case the High Court at Kuching held, *inter alia*, that the provision of s. 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976 requires that the Court must be satisfied that at the time when the petition was presented the domicile of both the petitioners was in Malaysia. As the husband petitioner in that case had not succeeded in showing that at the time of the presentation of the joint petition his domicile was in Malaysia, the Court held that it therefore had no jurisdiction to entertain the joint petition.

Counsel also referred to *WT Berge v. Salamah bte Salim* [1979] 1 MLJ 18 in which case the husband had petitioned for the dissolution of his marriage on the ground of his wife's adultery. The husband was however domiciled in Canada and the Singapore High Court held that as the husband was not domiciled in Singapore, the Court had no power to grant him a decree of divorce.

The Supreme Court then concluded as follows at p. 424 of the report:

> ... Even after amendment of the petition, the petitioner would still have to prove and satisfy the Court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the Court would exercise its powers under s. 48 of the Act to grant any relief to the parties.

all upon which the Court could assume jurisdiction and proceed to hear the petition. The petition itself shows in the preamble that the petitioner husband is a national of Thailand and while the petitioner wife holds an identity card (presumably Malaysian) represented by the acronym "NRIC" in the preamble of the petition, there is nothing to indicate her status, i.e whether she is a citizen of Malaysia, a permanent resident or a temporary resident. The issuance of an identity card to her does not *per se* confer upon her the status of a citizen of Malaysia. Regulation 3(1) of the National Registration Regulations 1990 ('the Regulations') requires all persons within Malaysia on the date of the coming into force of the Regulations on 31 December 1990, or subsequently entering Malaysia, to report to a registration officer and to be registered in accordance with the Regulations. Regulation 4(c)(viii) requires any such person to give to the registration officer **particulars of his status as a citizen of Malaysia or other citizenship status** (emphasis added). Regulation 5(2) and the First Schedule to the Regulations provide that the form of the identity card is to contain on the obverse side the residential status of the holder. Regulation 5(3) requires the inclusion therein of the following particulars:

(a) in the case of a person who is a citizen of Malaysia, the word "WARGANEGARA" (i.e citizen) printed on the identity card;

(b) in the case of a person who is not a citizen but a permanent resident in Malaysia, a red strip with the words "PENDUDUK TETAP" (i.e permanent resident) printed on the identity card;

(c) in the case of a person lawfully entering Malaysia under a valid immigration pass or permit otherwise than as a permanent resident or citizen and not being a person exempted under the Regulations, a green strip with the words "PENDUDUK SEMENTARA" (i.e temporary resident) printed on the indentity card; and

(d) in the case of a person registered under the Prevention of Crime Act 1959, a brown strip with the appropriate code as approved by the Director-General of National Registration printed on the indentity card.

In the present case, only the petitioner wife's indentity card number is disclosed in the preamble to the petition but not in the body thereof. The petitioners had jointly affirmed the supporting affidavit (Encl. (2)) only as to the truth of specified paragraphs in the body of the petition which did not include the preamble. But what is of greater importance is the fact that the petition and the supporting affidavit were devoid of any evidence showing into which of the above categories of holders of identity cards the petitioner wife fell for the Court to even consider whether the presumption as to the domicile of a person being in Malaysia by virtue of the petitioner wife having the status of a citizen of Malaysia could be invoked under s. 3(2) of the Act, independently of the domicile of the petitioner husband, so that the petition could be saved through an appropriate amendment.

For all the above reasons, I was constrained, in the exercise of the powers of the Court under O. 18 r. 19, and also in the exercise of its inherent powers as preserved by O. 92 r. 4, of the Rules of the High Court 1980 to dismiss the petition as disclosing no reasonable cause of action and also as an abuse of the process of the Court as the petition was bereft of any pleading containing the necessary facts to found jurisdiction to entertain these proceedings for a decree of divorce.

Reported by Anne Khoo